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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/725,120	12/02/2003	Eric T. Best	88265-7618	3342
29157	7590	12/05/2005	EXAMINER	
BELL, BOYD & LLOYD LLC P. O. BOX 1135 CHICAGO, IL 60690-1135			PEARSE, ADEPEJU OMOLOLA	
			ART UNIT	PAPER NUMBER

1761

DATE MAILED: 12/05/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/725,120	<b>Applicant(s)</b> BEST ET AL.	
	<b>Examiner</b> Adepeju Pearse	<b>Art Unit</b> 1761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-22 is/are pending in the application.  
     4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
     a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____.  |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) The invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1,3-4, 6 and 16 are rejected under 35 U.S.C. 102(b) as being anticipated by Jeffery et al (US Pat. No. 4,081,559). Jeffery et al disclose a shaped heat-resistance chocolate product containing an edible fat, sugar (abstract) and an emulsifier (col 2 line 12). The product contains individual fat particles, which are separated from one another in a sugar glass so that fat seepage from the product at elevated ambient temperatures is obviated (abstract). Jeffery et al also disclose that the chocolate product has little chance of fat seepage until temperatures which are sufficiently high to melt the sugar glass itself are encountered, for example 160° to 180°F (70°C to 80°C) (col 3 lines 47-50). It is inherent that the product retains its shape and appearance at temperatures up to 40°C as recited by the applicant.
3. With regard to claim 3, Jeffery et al disclose that the chocolate product has little chance of fat seepage until temperatures which are sufficiently high to melt the sugar glass itself are encountered, for example 160° to 180°F (70°C to 80°C) (col 3 lines 47-50). This temperature range is above 45°C as recited by the applicant. It is inherent that the article will be flowable at this elevated temperature.

4. With regard to claims 4-6, Jeffery et al disclose sucrose as a form of sugar in the chocolate product (col 4, table 1). Jeffery et al also disclose that the sugar could be glucose solids (col 6 lines 52-54).
5. With regard to claim 16, Jeffery et al disclose that the product can be evolved by utilizing a chocolate product provided with a conventional chocolate enrobing (co 3 lines 32-36). In addition, Jeffery discloses that wafers containing the chocolate product although not individually wrapped will not adhere to each other (col 3 lines 63-66). It is inherent that the wafers are enrobed with the chocolate product.

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
  2. Ascertaining the differences between the prior art and the claims at issue.
  3. Resolving the level of ordinary skill in the pertinent art.
  4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
8. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various

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claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

9. Claims 2, 7-15 and 17-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jeffery et al (US Pat. No. 4,081,559) in view of Kincs (US Pat. No. 5,108,769), Chen et al (US Pat. No. 4,338,350), and Alander et al (US Pat. No. 5,486,376). With regard to claims 2 and 15, Jeffery failed to disclose an enrobing process or water activity. However, Kincs teaches a coating prepared from a composition of fat, emulsifier, sugar etc cooled in an enrobing process to provide a coated product (abstract). It would have been obvious to one of ordinary skill in the art to modify Jeffery et al with Kincs by incorporating an enrobing process in order to provide a variety of coated confectionery products. Absent any clear and convincing evidence and/or arguments to the contrary it would be expected that the water activity is within the range recited by the applicant because the article is a coating therefore, moisture migration should be limited.

10. With regard to claim 7, Jeffery failed to disclose non-fat milk and coconut or soy oil as ingredients. However, Kincs teaches a suitable fat component such as soybean fat (col 4 lines 11-13), coconut fat (col 4 lines 18-19) and using non-fat milk solids (col 5 line 25). It would have been obvious to one of ordinary skill in the art to modify Jeffery et al with Kincs by incorporating these ingredients for their art recognized functions.

11. With regard to claims 8-9 and 12, Jeffery failed to disclose adding a stabilizer component. However, Kincs teaches that ingredients such as stabilizers could be added in a

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chocolate coating composition (col 2 line 68). Kincs is silent as to the types of stabilizer to utilize, however, it would be expected that maltodextrin, gums, pectins, cellulose derivatives, etc are well known for their art recognized functions as stabilizers. It would have been obvious to one of ordinary skill in the art to modify Jeffery et al with Kincs by incorporating stabilizing ingredients in the composition in order to have a stable product.

12. With regard to claim 10, Jeffery et al disclose that preferably an emulsifier is included in the solution (col 2 lines 12-15). However, Jeffery et al failed to disclose monoglycerides or mono-diglycerides. Alander et al teach a heat resistant chocolate composition that comprises of common food emulsifiers such as mono or diglycerides (col 2 lines 65-67). It would have been obvious to one of ordinary skill in the art to modify Jeffery et al with Alander et al with these emulsifiers because they are well known in the art.

13. With regard to claim 11, Jeffery et al disclose the edible composition can comprise any edible animal or vegetable fat (col 2 lines 34-36) and that the edible fat ranges from 15% to 35% by weight which is within applicant's recited range. However, Jeffery et al failed to disclose the solid fat content of the edible fat. Kincs teaches suitable fat component such as soybean fat (col 4 lines 11-13), coconut fat (col 4 lines 18-19). It would have been obvious to one of ordinary skill in the art to modify Jeffery et al with Kincs by incorporating these edible fats for their art recognized functions and it would be expected that the solid fat contents of these oils/fat is as recited by the applicant absent any clear and convincing evidence and/or arguments to the contrary.

14. With regard to claim 13, Jeffery et al disclose the edible composition can comprise any edible animal or vegetable fat (col 2 lines 34-36) and that the edible fat ranges from 15% to 35%

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by weight, which is within applicant's recited range and that preferably an emulsifier is included in the solution (col 2 lines 12-15). However, Jeffery et al failed to disclose sugar being present as crystals at 75% to 95%. Chen et al teach a crystallized sugar product such as a cocoa product (col 7 example 7) having at least 80% sucrose (col 3 lines 18-19). It would have been obvious to one of ordinary skill in the art to modify Jeffery et al with Chen et al by incorporating sugar crystals in order to be readily dispersible or dissolvable in a liquid.

15. With regard to claim 14, Jeffery et al failed to disclose the size of the sugar crystals. However, Chen et al teach sucrose crystals with a size of 3-50 microns (col 1 lines 62-64) incorporated into a food product. It would be obvious to one of ordinary skill in the art to modify Jeffery et al with Chen et al by incorporating these sugar crystals so that they are readily dispersible or dissolvable.

16. With regard to claims 17 and 20-22, Jeffery et al disclose a shaped heat-resistance chocolate product containing an edible fat, sugar (abstract) and an emulsifier (col 2 line 12). The chocolate product has little chance of fat seepage until temperatures, which are sufficiently high to melt the sugar glass itself, are encountered, for example 160° to 180°F (70°C to 80°C) (col 3 lines 47-50). This temperature range is above 40°C, therefore it would be expected that the article would retain its shape and appearance at temperatures up to 40°C and be flowable at this elevated temperature in order to enable coating to occur. However, Jeffery et al failed to disclose an enrobing process. Kins teaches a coating prepared from a composition of fat, emulsifier, sugar etc cooled in an enrobing process to provide a coated product (abstract). It would be obvious to modify Jeffery et al with Kins by utilizing the article composition as a coating for confectionery products because Kins teaching comprises similar components and therefore

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would perform equally well in an enrobing process absent any clear and convincing evidence and/or arguments to the contrary.

17. With regard to claim 18, Jeffery failed to disclose chilling the enrobed confectionery product. However, Kincs teaches passing a coated/enrobed product through a cooling tunnel at about 55°F (~12°C) in order for the coating to set in and form an enrobed food product (col 5 lines 39-41). Absent any clear and convincing evidence and/or arguments to the contrary, it would be expected that the cooling tunnel temperature is a chilling temperature and it would have been obvious to one of ordinary skill in the art to modify Jeffery et al with Kincs by cooling/chilling the enrobed product in order for the coating to set in.

18. With regard to claim 19, Jeffery et al disclose the edible composition can comprise any edible animal or vegetable fat (col 2 lines 34-36) and that the edible fat ranges from 15% to 35% by weight, which is within applicant's recited range and that preferably an emulsifier is included in the solution (col 2 lines 12-15). However, Jeffery et al failed to disclose sugar being present as crystals at 75% to 95%. Chen et al teach a crystallized sugar product such as a cocoa product (col 7 example 7) having at least 80% sucrose (col 3 lines 18-19). It would have been obvious to one of ordinary skill in the art to modify Jeffery et al with Kincs and Chen et al by incorporating sugar crystals as ingredients so that they are readily dispersible or dissolvable.

### ***Conclusion***

19. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Prior art contains similar subject matter.



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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



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